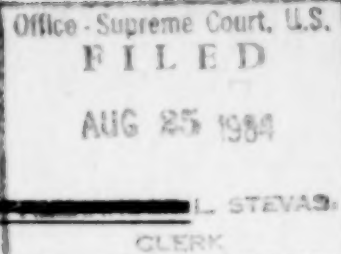


**No. 83-1075 and 83-1249**



**IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1984**

**CENTRAL INTELLIGENCE AGENCY,  
and WILLIAM J. CASEY,**  
*Petitioners-Respondents,*

**v.**

**JOHN CARY SIMS and SIDNEY M. WOLFE,**  
*Respondents-Petitioners.*

**ON WRITS OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF FOR RESPONDENTS IN No. 83-1075  
AND FOR PETITIONERS IN No. 83-1249**

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## **QUESTIONS PRESENTED**

### **I. (in No. 83-1075)**

Are scientific researchers, engaged in research in the United States more than twenty years ago, "intelligence sources" within the meaning of 50 U.S.C. § 403(d)(3) and therefore exempt from disclosure under Exemption Three of the Freedom of Information Act?

### **II. (in No. 83-1249)**

Did the court of appeals err by affirming, without explanation, the district court's decision to permit the Central Intelligence Agency to withhold the names of institutions at which MKULTRA research was conducted, even though the institutions themselves are not "intelligence sources" within the meaning of 50 U.S.C. § 403(d)(3), and even though the CIA failed to present any evidence to show that disclosure of the institutions would lead to identification of researchers?

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**INTRODUCTION**

This action under the Freedom of Information Act, 5 U.S.C. § 552, seeks access to records of the Central Intelligence Agency ("CIA") which identify the researchers and institutions involved in the MKULTRA project — the CIA's research program, conducted in the late 1950s and early 1960s, into behavioral modification techniques and mind-altering drugs. There are three points which merit emphasis at

the outset because, taken together, they provide the cornerstone of respondents' case before this Court.<sup>1</sup>

First, this is a case arising under the Freedom of Information Act ("FOIA") — not the National Security Act. This difference is vital because the CIA asks this Court to construe the term "intelligence source" in 50 U.S.C. § 403(d)(3) in isolation, forgetting that its only relevance is that it is incorporated into the FOIA by operation of Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3). Thus, although we agree with the CIA that the meaning of the term "intelligence source" is the principal issue before the Court, that term must be construed in a manner consistent with the dictates of Exemption 3 and the other provisions of the FOIA.

Second, the CIA studiously avoids focusing on the facts of *this* case. Aside from a perfunctory statement of the case, virtually all of the illustrations used by the CIA in its brief have nothing to do with the information that respondents seek. On the contrary, the facts of this case are highly unusual, inasmuch as the MKULTRA program involved nothing even remotely resembling the sort of intelligence activities to which the CIA alludes throughout its brief. Rather, MKULTRA entailed entirely academic research conducted primarily by college professors in the United States, almost half of whom were unaware that they were working for the CIA. Indeed, it is precisely because the underlying activities were so far removed from the basic mission of the CIA that the Agency has steadfastly refused to defend this case on the basis of the FOIA's national security exemption, 5 U.S.C. § 552(b)(1).

Third, throughout its brief the CIA persists in suggesting that the court of appeals' definition of "intelligence source" stands as a hard and fast, bright-line test of what constitutes an intelligence source, to be applied as if it were a statutory

<sup>1</sup>In this brief, Mr. Sims and Dr. Wolfe, respondents in No. 83-1075, and petitioners in No. 83-1249, will be referred to as "respondents." The petitioners in No. 83-1075, which are also the respondents in No. 83-1245, will be labeled "petitioners", "CIA" or "the Agency."

definition. That is not the case. As the court of appeals emphasized in *Sims I*, it was in response to the CIA's urging that the court sought to formulate a general test to guide the courts. Thus, in holding that the term "intelligence source" had to be construed in a manner that would "focus on the practical necessity of secrecy," the court laid down guidelines which would have to be applied with an eye toward the CIA's "functional" needs, not an ironclad, inflexible definition, as the CIA contends.

## STATEMENT

### A. The MKULTRA Project

Between 1952 and 1966, the CIA financed a program of experimental, laboratory and library research devoted primarily to behavior modification techniques and mind-altering drugs. The projects, all of which were conducted in the United States, were known collectively as MKULTRA. The research was essentially academic in nature, ranging from drug experiments on individuals to laboratory research on deterioration of petroleum products, from the synthesis of mind-altering drugs to the preparation by a magician of a manual on sleight-of-hand techniques.

Many of the scientists were funded through a front organization, the Society for Investigation of Human Ecology. As a result, many of the projects' researchers — not to mention the major universities and other institutions at which they were employed, which were often not even advised that the contracts had been awarded — were unaware of the CIA's involvement.

Revelation of the existence of the MKULTRA program in 1975 provoked considerable controversy about government abuse of scientific research, about CIA use of campus facilities, and about scientists' abuse of human experimental subjects. Although the general areas covered by the project have been discussed at Congressional hearings, in television



news specials, and in various publications, most of the details are as yet unknown. The reason for this is that in 1973, departing CIA Director Richard Helms arranged for the destruction of all known files pertaining to MKULTRA, in order to prevent it from being "misunderstood." Marks, *The Search for the Manchurian Candidate* 205 (1979). According to the special Senate Committee which was established to inquire into this and other questionable CIA activities:

The destruction of the MKULTRA documents made it impossible for the Select Committee to determine the full range and extent of the largest CIA research program involving chemical and biological agents [and] prevented the CIA from locating and providing medical assistance to the individuals who were subjects in the program.

Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Final Report: Foreign and Military Intelligence*, S. Rep. No. 755, 94th Cong., 2d Sess. 404 (1976). See also *id.* at n. 75.

Although the CIA followed Helms' instructions, its archivists failed to find certain MKULTRA records that had been misfiled. For the most part, the surviving documents are research contracts, vouchers, bills, and similar materials concerning the initiation and financing of the projects. Apart from a few progress reports used to justify requests for more money, and occasional substantive references in the contracts that permit educated guesses about the basic objectives of certain subprojects, the documents are singularly uninformative about the matters of greatest public interest — what did the researchers do, what were their findings, what were the side effects of the work and who was victimized. Indeed, the CIA, following what it described as a "careful review" of the documents, found that they contained no information which required "continued protection," and accordingly declassified them in 1977. Pet. App. 90a. Because the leading CIA figures in the program have either refused to discuss the details or

claimed poor memory, the only remaining avenue to investigate MKULTRA is to identify the researchers, talk to them, and then to undertake further independent analysis to determine what they did.

## B. Proceedings Below

### 1. *Sims I*

On August 22, 1977, respondents John Cary Sims, a lawyer, and Sidney M. Wolfe, M.D. the director of the Public Citizen Health Research Group, made a request to the CIA under the FOIA to release records identifying both the principal researchers ("PRs") for all MKULTRA subprojects and the institutions at which each PR conducted his or her work. Although the CIA initially refused to honor the request, citing Exemptions 3 and 6, respondents acceded to the CIA's suggestion that further action be deferred until it had had an opportunity to contact the institutions (but not the PRs) to learn whether they would object to their identification.

On June 13, 1978, the CIA sent respondents a final response refusing to provide the names of any PRs. It did include alphabetical lists of the institutions at which the researchers conducted their work, including subproject numbers for each institution.<sup>2</sup> From those lists, the CIA deleted the names of approximately one-third of the institutions, which either did not respond to the CIA's two letters or asked for anonymity. In no instance did the CIA even consider that, by identifying an institution, it might lead to identification of the researcher who worked there; it simply acceded to the wishes of each institution in deciding whether to identify that institution.

Respondents filed this FOIA action on November 30, 1978. The CIA initially asserted two grounds for withholding the identities of the PRs and their institutions. First, it claimed that the identities were exempt pursuant to Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), which protects matters "specifically exempted from disclosure by statute," if the other statute either leaves the agency no discretion on

<sup>2</sup> The lists are reproduced as an Addendum to this brief.

withholding, or sharply confines the agency's discretion. The CIA contended that because the MKULTRA work was of assistance to the CIA's intelligence-gathering function, the PRs and the institutions were exempt from disclosure as "intelligence sources" within the meaning of 50 U.S.C. § 403(d)(3). Second, the Agency asserted that identification of the PRs would constitute "a clearly unwarranted invasion of [their] personal privacy," and thus nondisclosure of the researchers' identities was authorized by Exemption 6 of the FOIA. 5 U.S.C. § 552(b)(6).<sup>3</sup>

Although its briefs and affidavits were replete with references to national security, and although the district court, concerned about the validity of the Agency's other defenses, repeatedly urged the CIA to consider invoking the national security exemption, 5 U.S.C. § 552(b)(1), the Agency declined to do so. It also rejected the district court's repeated suggestions that it correspond directly with the PRs, as it had with the institutions, to learn whether they objected to disclosure and whether they had expected that their identities would be kept secret. The CIA claimed that such correspondence, even if not revealed to respondents, would itself be an invasion of the privacy of those PRs who were unaware of their CIA connection.

Finally, in a further effort to afford the CIA protection from the reach of the FOIA, the district court hypothesized that the CIA might have implicitly or explicitly promised confidentiality to the PRs, and invited the parties to brief the question of whether the CIA might be contractually bound not to release their identities, and whether the FOIA, which was passed after these contracts were made, could constitutionally abrogate the Agency's secrecy obligations. The CIA, however, declined to rely on that theory, inasmuch as it would also prevent the Agency from releasing the identities if it chose to do so. *See* Pet. App. 71a, 74a-75a.

<sup>3</sup> Both the district court and the court of appeals rejected the Agency's privacy claim, Pet. App. 53a-58a, 80a-82a, and the issue was not presented in the petition for a writ of certiorari.

On cross-motions for summary judgment, the district court rejected the CIA's claims in two opinions. Pet. App. 66a-70a and 73a-82a. The court reasoned that the CIA had failed to establish that these researchers or institutions were "intelligence sources" within the meaning of § 403(d)(3), and that the CIA's proposed definition of the statutory term — any "contributor to the intelligence process" — was far too broad to be acceptable. Pet. App. 78a. In rejecting the CIA's approach, the court ruled that persons who conducted academic research for purposes "collateral to the business of intelligence" were not "intelligence sources" within the meaning of the term. Pet. App. 79a.

On appeal, the CIA offered a new definition of "intelligence source", *i.e.*, any individual or entity that provides the CIA with "substantive information having a rational relation to the nation's external national security." Pet. App. 46a. The court of appeals, however, rejected this proposal as too broad. Rather, it said, in light of the FOIA's objective of ensuring that the matters exempted from disclosure be defined by legislative judgments rather than unreviewable executive discretion, the "intelligence sources" exemption should be construed in accordance with the purpose of § 403(d)(3). Taking up the CIA's request for a definition of the statutory phrase, the court of appeals focused on the "practical need" for secrecy in order to protect the sources and produced the following working definition of "intelligence sources" designed, in large part, to deal with the case before it:

an intelligence source is a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

Pet. App. 50a.

The case was thus remanded to the district court for application of the definition to the identities at issue. Judge



Markey agreed that the CIA's proposed definition "sucks into which secrecy's maw too many sources of too many kinds of information," and wholeheartedly endorsed the majority's construction of § 403(d)(3). Pet. App. 61a. He dissented only on the necessity of a remand, because in his view the CIA had steadfastly refused to seek or present the kind of evidence which would be necessary on remand, Pet. App. 62a, and because it was plain to him that these PRs and institutions were not "intelligence sources" and hence their names should be released immediately. Pet. App. 63a-64a.

## 2. *Sims II*

On remand, the CIA extensively searched its files for documentary evidence bearing on any explicit or implicit promises of confidentiality made to any PRs. However, it still declined to contact either the PRs or those CIA employees who had been directly involved in the MKULTRA program to support its defense. Instead, it relied principally on two affidavits from M. Corley Wonus, a current CIA official who had no personal knowledge of any aspect of MKULTRA. App. 15-28. The Agency's submissions presented general arguments about the importance of protecting the confidentiality of intelligence sources, a matter which has never been disputed, and made claims that the evidence showed that both the CIA and the PRs desired confidentiality. The Agency also argued in its briefs that it was unnecessary to show that a particular researcher wanted anonymity to qualify as an intelligence source, so long as the CIA could show that it had tried to keep the researchers' activities secret for its own purposes — *i.e.*, to prevent other nations from learning the research topics on which the CIA was working. In this regard, the CIA did not address, much less explain, the apparent anomaly of invoking Exemption 3 to protect its secrecy interests instead of asserting Exemption 1, which is specifically tailored to protecting national security information.

Because the CIA was unwilling or unable to produce evidence showing a need for confidentiality for most of the PRs, the district court ruled that almost none of the

MKULTRA researchers were intelligence sources. First, it reasoned that unless the CIA had in fact provided the PRs with explicit or implicit guarantees of confidentiality, it could not be said that such a guarantee was needed in order to secure information from the researcher. Although the record revealed ample evidence of a desire on the part of the CIA to keep the program secret, it revealed "very little evidence that any of the researchers themselves desired confidentiality." Pet. App. 23a. Indeed, the evidence revealed numerous cases before, during and after MKULTRA in which the CIA had had to take steps to stop PRs from revealing the CIA's involvement in their research, but not the opposite. Pet. App. 26a; App. 57, 60. Moreover, it was obvious from the nature of many of the subprojects that they could readily be explored without a guarantee of confidentiality.<sup>4</sup>

However, for six PRs there was evidence demonstrating that the PR had told the CIA that he was concerned about confidentiality, or the evidence otherwise suggested an implicit guarantee of confidentiality. The district court concluded, and respondents did not disagree, that the CIA had proven that these six PRs were intelligence sources; the court therefore allowed their names to be withheld. Pet. App. 26a. However, as respondents stressed, and as the district court observed: "The absence of such evidence with respect to almost all other researchers stands in stark contrast." Pet. App. 26a.

Despite its ruling, the district court did not order the release of the identities of the remaining PRs or of their institutions. Instead, it allowed the CIA to submit voluminous additional *in camera* affidavits and supporting documents, and it con-

<sup>4</sup> The district court cited several examples. Pet. App. 25a-26a. Others included a magician who was paid to write a manual on sleight-of-hand techniques; research on aerosol delivery systems; a study of the relationships between molecular constitution and biologic response; a study of sleep and insomnia; investigation of the absorption of alcohol into the blood; reviews of published literature about handwriting analysis and similar subjects; and a study of ways to obtain information from soil. See generally Analysis of MKULTRA Principal Researcher Files, submitted with Plaintiffs' Motion for Summary Judgment, June 10, 1981.



ducted four *ex parte*, *in camera* hearings attended only by CIA officials and their counsel. Based on this new evidence, the district court found that an additional 41 PRs had been engaged in other work for the CIA which made them intelligence sources, and allowed the CIA to withhold their identities because their connection with MKULTRA might lead to the exposure of their other CIA work. Pet. App. 28a-31a. The court also accepted the argument made in the CIA's briefs, unsupported by any affidavits or other evidence and indeed undermined by the Agency's disclosure of two-thirds of the institutions, that, although the institutions were not themselves intelligence sources, identification of an institution could lead to disclosure of a PR. Accordingly, the court allowed the CIA to withhold the identity of any institution whose researcher's identity was exempt from disclosure. Pet. App. 27a.

Both sides appealed. The court of appeals did not discuss the issue of the institutions, thus implicitly affirming the district court in that regard. With respect to the PRs, however, it reversed the district court in every respect and remanded the case to permit application of the *Sims I* definition, as refined in *Sims II*. Pet. App. 9a. Specifically, the court ruled that the key issue in deciding whether a PR was an intelligence source was the "kind" of information provided. Pet. App. 4a-5a. The fact that confidentiality was desired by a researcher would be probative of the need for secrecy, but could not be conclusive, both because a particular researcher might be either atypically sensitive or atypically insensitive to public disclosure and because the CIA might collude with a researcher to manufacture requests for, or promises of, confidentiality. Pet. App. 6a-7a. Accordingly, the district court was directed to reconsider the status of all PRs.

Judge Bork dissented in part. He disagreed with the majority's readiness to discount an express promise of confidentiality, and he declined to join in a phrase in the majority opinion which attributed the CIA's resistance to disclosure to a fear of public outcry about MKULTRA. Finally, without discussing the availability of Exemption 1, he expressed "some doubt"

about the *Sims I* definition of intelligence source because he feared that the CIA might not be able to protect the secrecy of its interest in certain topics.

Both sides petitioned for rehearing. The CIA sought reconsideration of the ruling in *Sims I* as well, suggesting rehearing en banc. Respondents sought only clarification and an express ruling on the status of the institutions. The court denied both petitions.

### SUMMARY OF ARGUMENT

1. The principal issue in this case is whether scientists who conducted research in the United States for the CIA more than twenty years ago are "intelligence sources" whose names may be withheld under Exemption 3 of the FOIA and 50 U.S.C. § 403(d)(3). The Agency makes no claim that release of that information would damage the national security and hence could be properly classified. Instead, petitioners urge this Court to adopt a virtually limitless and judicially unreviewable definition of the term intelligence source, in direct contravention of (a) the basic disclosure goal of the FOIA, (b) the narrowing purpose of the 1976 amendment to Exemption 3, (c) Congress' rejection of virtually the same plea when it overturned this Court's decision in *EPA v. Mink*, 410 U.S. 73 (1973), and (d) the principal method by which Congress sought to control improper agency withholdings — *de novo* judicial review.

The CIA argues that, as used in 50 U.S.C. § 403(d)(3), an "intelligence source" is any person who provides the CIA with "intelligence information"; this term, in turn, is defined by the Agency as any information which the CIA reasonably believes it needs, Br. at 28, a formulation even broader than that which it proposed in the court of appeals. Respondents agree that an intelligence source is one who provides the CIA with a certain kind of information, namely intelligence, but that does not mean that any information reasonably desired by it constitutes "intelligence." The courts below properly rejected the CIA's concept of an intelligence source as overly broad, and instead formulated a definition which correctly

distinguished between those who warranted protection and those who did not.

The major flaw in the CIA's argument is that it views § 403(d)(3) in isolation, without reference to the policies of the FOIA, to the broader statutory scheme of which § 403(d)(3) is a part, or to the unique facts of this case. Thus, § 403(d)(3) is relevant only insofar as it allows the CIA to withhold records under the FOIA, which requires disclosure of all matters not explicitly allowed to be kept secret. Here withholding is pursuant to Exemption 3, which was originally construed to include statutes affording agencies open-ended discretion to withhold records. *Federal Aviation Admin. v. Robertson*, 422 U.S. 255 (1975). However, Congress overruled this construction by amending the exemption to include only statutes in which Congress itself has made the basic decisions about which matters should be disclosed and either eliminated or narrowly confined the Agency's discretion to decide whether particular records should be withheld. Accordingly, in order to apply § 403(d)(3) to authorize withholding under the FOIA it is necessary to construe it in a manner which would make it an Exemption 3 statute. Yet to give § 403(d)(3) the breadth urged by the CIA would preclude it from being an Exemption 3 statute, a result which the CIA plainly does not desire.

The Agency also severs § 403(d)(3) from its own legislative history. Although Congress recognized that intelligence sources would be a diverse lot, the CIA's intelligence mission was intended to focus principally on gathering information about foreign countries which could not be obtained if the targets of the inquiry knew of the CIA's efforts. Congress was also aware that the sources of this "intelligence" would face "deadly peril" if their roles were revealed. To protect the identities of such covert sources, Congress mandated in § 403(d)(3) that the CIA protect "intelligence sources and methods from unauthorized disclosure." Scientific researchers like those involved in this case simply do not present the problem that Congress sought to avoid.

The court of appeals, asked by the CIA to formulate a definition of intelligence sources, defined the term to include providers of information, needed for the intelligence function, which the CIA "could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it." That definition constitutes a workable formula for protecting those whose safety might be imperiled by disclosure, while at the same time enabling the courts to continue to conduct a *de novo* review of agency withholding claims, as the FOIA requires. The CIA recognizes the need to draw some line, but argues that the Agency alone should perform that function. That approach would transform § 403(d)(3) into a standardless non-disclosure statute of the sort which Congress intended to exclude from Exemption 3 by the post-*Robertson* amendment.

In order to persuade the Court to reject the court of appeals' formulation as unduly narrow, the CIA asserts that it would result in the devastation of the intelligence-gathering function. The CIA's analysis is flawed because it both misconstrues the court of appeals' formulation and ignores the many other defenses the CIA can mount against disclosure, principally Exemption 1 of the FOIA which provides blanket protection for information whose disclosure would harm national security.

The CIA's final objection is that the availability of judicial review itself threatens its mission because it creates a perception on the part of potential intelligence sources that their identities cannot be fully protected. But this perception cannot be avoided without exempting the CIA from the core requirement of the FOIA, *de novo* judicial review of agency withholding. Indeed, even the withholding of classified national security information, such as troop movements and deployment of nuclear weapons, is subject to judicial review as a result of the 1974 amendment to Exemption 1 which overruled *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1974). Moreover, since Congress has repeatedly refused CIA requests for exemption from judicial review under the FOIA,



this Court may not grant the CIA that which Congress has refused it.

2. The cross-petition for certiorari challenges the CIA's refusal to identify the institutions at which the researchers who are found to be intelligence sources performed their work, unless the institutions expressly consented. The courts below allowed withholding on the theory that, although the institutions are not themselves sources, their disclosure could "lead to" identification of researchers who are. But the CIA failed to submit any evidence to support this "lead to" argument, although the FOIA squarely places the burden on the agency to justify withholding. Moreover, the Agency had previously identified some two-thirds of the institutions and the subprojects performed there without any concern that such disclosure might lead to identification of the researchers; yet it offered no explanation for the glaring contradiction.

### ARGUMENT

#### I. DOMESTIC SCIENTIFIC RESEARCHERS WHO WERE PAID BY THE CIA TO DO LABORATORY AND LIBRARY RESEARCH MORE THAN TWENTY YEARS AGO ARE NOT "INTELLIGENCE SOURCES" WHOSE NAMES ARE EXEMPT FROM DISCLOSURE UNDER 50 U.S.C. § 403(d)(3) AND EXEMPTION 3 OF THE FOIA.

##### A. The FOIA Requires That Statutory Exemptions Such as Section 403(d)(3) Be Construed Narrowly.

Any attempt to comprehend the scope of an exemption from mandatory disclosure under the FOIA, such as § 403(d)(3), must begin with an understanding of the statutory scheme of disclosure embodied in the FOIA itself. The FOIA was enacted because Congress was dissatisfied with the failure of federal agencies to disclose information under the vague standards of section 3 of the Administrative Procedure Act, which allowed agencies to withhold data "requiring

secrecy in the public interest." *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979).

Congress responded with the FOIA, which established a broad mandate for disclosure, subject to nine Congressional exemptions. The Act requires that all matters be made public "unless explicitly allowed to be kept secret by one of the exceptions . . ." S. Rep. No. 813, 89th Cong., 1st Sess. 15 (1965) (emphasis added). Courts are directed to review claims of exemption *de novo*, and "the burden is on the agency to sustain its actions." 5 U.S.C. § 552(a)(4)(B). Moreover, the exemptions "must be narrowly construed." *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Consequently, this Court has "consistently recognized that the basic objective of the Act is disclosure," *Chrysler Corp. v. Brown*, *supra*, 441 U.S. at 290. See also *Department of Air Force v. Rose*, *supra*, 425 U.S. at 361 ("the basic policy [is] that disclosure, not secrecy, is the dominant objective of the Act").<sup>5</sup>

This case involves Exemption 3, which allows withholding on the basis of other, specific nondisclosure statutes. As originally enacted, Exemption 3 included any matters which were "specifically exempted from disclosure by statute." This provision was broadly construed in *Federal Aviation Admin. v. Robertson*, 422 U.S. 255 (1975), where this Court ruled that Exemption 3 included a statute with the kind of open-ended agency discretion that the CIA argues is embodied in § 403(d)(3). Compare *id.* at 263-267 with CIA Br. at 22-24.

Congress promptly responded to *Robertson* by amending the FOIA to narrow Exemption 3 considerably. Section 5(b), Government in the Sunshine Act, Pub. L. 94-409 (1976). Rather than allowing an agency to withhold records pursuant to any Congressional enactment permitting secrecy, the new exemption includes only a statute which

<sup>5</sup> The CIA's brief makes repeated deprecating references to "what the court of appeals considered to be the pro-disclosure 'spirit' of the FOIA." Br. at 12, 22, 23. Contrary to the implication of these references, the pro-disclosure philosophy of the statute appears on its face, in its legislative history, and in the decisions of this Court.

(A) requires that the matters be withheld from the public in such a way as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Congress believed that the construction of Exemption 3 in *Robertson* created a "gap" in the FOIA since it gave the power to the agencies, rather than to Congress, to make the policy decision about whether a particular record should be disclosed. H.R. Rep. No. 94-880, 94th Cong., 2d Sess. 23 (1976). Thus, the express purpose of the 1976 amendment was to overrule the open-ended secrecy rule of *Robertson*. H. R. Conf. Rep. No. 94-1441, 94th Cong., 2d Sess. 25 (1976). The new Exemption 3 removed agency discretion to keep records secret. Instead, it allowed withholding only pursuant to those statutes in which the legislative branch, rather than the executive branch, had not only made the basic policy decision concerning the dangers of releasing certain data, but also provided a formula ("particular criteria" or "particular types" of matters) pursuant to which both the agency and reviewing courts could decide whether disclosure in any instance would pose the hazard that Congress foresaw. *Lee Pharmaceuticals v. Kreps*, 577 F.2d 610, 614-616 (9th Cir. 1978); *American Jewish Congress v. Kreps*, 574 F.2d 624, 628-629 (D.C. Cir. 1978).

The committee reports on the 1976 amendment listed several statutes that would be included under it. However, contrary to the claim made in the CIA's brief, at 15, nowhere did Congress specify that the new Exemption 3 incorporated 50 U.S.C. § 403(d)(3) as a withholding statute. The 1974 committee reports cited at page 15 of the CIA's brief are singularly unhelpful — they did indeed say that § 403(d)(3) was included in Exemption 3, but referred only to the old Exemption 3 language which was construed in *Robertson*. The 1976 report cited by the Agency has greater bearing, but is actually contrary to the CIA's position because it proposed adding language, ultimately not adopted, which it described as

necessary to "clarify" that § 403(d)(3) would be included within the exemption.<sup>6</sup>

The only basis for treating § 403(d)(3) as an Exemption 3 statute would be a determination that, as properly construed, that section provides an explicit formula which meets the 1976 standard because it eliminates entirely (subpart A), or narrowly confines (subpart B), the Agency's discretion to decide whether records should be withheld. The statute plainly does not fall within subpart (A), inasmuch as it does not require withholding in such a way as to eliminate all discretion. Nor does it establish "particular criteria for withholding" under the first clause of subpart (B). Thus, § 403(d)(3) can only be included if it refers to "particular types" of information "to be withheld" — the second clause of subpart B.

In these circumstances, it was scarcely "fundamentally misconceived", as the CIA contends, Br. at 22, for the court of appeals to construe § 403(d)(3) in light of the dictates of the 1976 amendment to Exemption 3. Absent such a construction, the provision would be too expansive and too discretionary to pass muster under Exemption 3, and thus the CIA would not be able to rely on § 403(d)(3) to withhold the names of any intelligence sources. Instead, it would be required in each case to establish that disclosure of the name would damage the national security and would therefore be exempt pursuant to Exemption 1.

The CIA nevertheless argues for a construction of the statute which ignores the intent of the post-*Robertson* amendment and looks only to the legislative history of § 403(d)(3) which, as shown in the next section of this brief, is not very il-

<sup>6</sup> To understand the genesis of the language ultimately substituted for Exemption 3, compare the House Government Operations Committee Report, H. R. Rep. No. 94-880, 94th Cong., 2d Sess., Part I at 9 (1976) (includes only statutes that require withholding) with the House Judiciary Committee Report cited by the CIA, *id.*, Part II at 15 (includes statutes that "require or permit" withholding). The enacted statute excludes the "or permit" language and substitutes for it subpart (B) requiring particular criteria or particular types of information. See *Lee Pharmaceuticals v. Kreps*, 577 F.2d 610, 615-616 nn. 4 and 8 (9th Cir. 1978).



luminating. But it is fundamental law that the courts may properly take into account a later development in "an evolving pattern of regulation" — here, the legislative scheme for public access to government information — in deciding the meaning of unclear language in part of the scheme previously enacted. *NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274, 291-292 (1960), *quoted in NLRB v. Allis Chalmers Mfg. Co.*, 388 U.S. 175, 194 (1967); *Hunter v. Erickson*, 393 U.S. 385, 388 (1968). Thus, the basic proposition that FOIA exemptions "must be narrowly construed," *Department of Air Force v. Rose*, *supra*, fully applies to statutes which become exemptions by way of Exemption 3. More specifically, section 403(d)(3) should be construed in a manner consonant with the congressional formula on which the 1976 amendment to Exemption 3 was premised, and in a manner which would "fulfill Congress' intent to close the loophole created by *Robertson . . .*" *Founding Church of Scientology v. NSA*, 610 F.2d 824, 829 (D.C. Cir. 1979).

*B. Section 403(d)(3) Was Not Intended to Bar Disclosure of Researchers Like the MKULTRA Scientists.*

The legislative history of § 403(d)(3) fails to buttress, and even undercuts, the CIA's expansive construction of the term "intelligence sources." The framers of the National Security Act of 1947, 50 U.S.C. § 401 *et seq.*, were primarily concerned with the coordination and division of responsibility among the various departments after the national security and national defense functions were reorganized in the aftermath of World War II. 50 U.S.C. § 401. During the War, the Office of Strategic Services, the CIA's predecessor agency, had been barred from operating in the Western Hemisphere and was denied access to intelligence obtained by other bodies.

Titles I and II of the Act, 61 Stat. 496-507, create the various military and security agencies and allocate the various defense and security functions among them. Section 102, 50 U.S.C. § 403, creating the CIA, provided in subsection (d)(3) that although the Agency would correlate, evaluate, and disseminate intelligence, other agencies would

continue to share in that responsibility. It then added that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." The section does not, on its face, require the withholding of any information but simply assigns to the CIA (rather than to each individual agency) the task of protecting "intelligence sources" for all agencies from unauthorized disclosure. The fact that § 403(d)(3) was written as an organizational rather than information-withholding statute perhaps explains why its legislative history contains no hint as to what the term was meant to cover.

Recognizing the absence of legislative history on the meaning of intelligence sources, the CIA instead relies on remarks by members of Congress and intelligence officials about the intelligence which was required to carry on the CIA's mission and the means by which it would be obtained. Because the scope of the intelligence contemplated by Congress was highly diverse, the CIA argues, the term "intelligence sources" should be equally diverse — broad enough to cover even such MKULTRA researchers as the scientists who conducted cancer research and laboratory studies concerning the deterioration of petroleum products or the educator who studied the usefulness of mechanization in foreign language instruction.

But contrary to the CIA's argument, the very remarks upon which it relies, Br. at 18-19, suggest that Congress had a very different sort of "intelligence source" in mind when it enacted § 403(d)(3):

- Information would be gathered about the armed forces, industries, race, religion and "other related aspects" of a possible enemy (Admiral Nimitz).
- Americans who traveled around the world would report what they see and hear (Allen Dulles).
- "[A]ll possible data pertaining to the foreign governments or the national defense and security" would be used (General Vandenberg).
- The agency would receive "information coming

from all over the world through all kinds of channels." (Rep. Wadsworth).

These are the "Intelligence sources" Congress had in mind. Plainly, their ability to provide reliable information to the CIA depended on foreign ignorance that they were doing so. In order to recruit them, it was necessary to guarantee that their CIA connection would be kept confidential. They are the "sources" of which Messrs. Dulles and Vandenberg spoke, CIA Br. at 20, and of which this Court wrote in *Snepp v. United States*, 444 U.S. 507, 512 (1980), who would "close up like a clam" if they could not be guaranteed confidentiality and who would face "deadly peril" if their identities were revealed. They are, however, a far cry from the alleged "intelligence sources" involved in this case. The scientific researchers — not to speak of the magician who was engaged to write a manual on sleight-of-hand techniques — did not depend on confidentiality to gain access to information; few of them sought or received pledges of confidentiality, and they scarcely faced peril from identification — or face it today if they are even alive thirty years later.

Indeed, the legislative history suggests that Congress believed that the CIA's intelligence sources would not extend to scientific researchers working within the United States. Thus, Representative Holifield reassured his colleagues as follows:

I want to impress upon the minds of the Members that the work of the Central Intelligence Agency, as far as the collection of evidence is concerned, is strictly in the field of *secret foreign intelligence — what is known as clandestine intelligence.*

93 Cong. Rec. 9430 (1947)(emphasis added).

Neither Representative Holifield, nor the rest of the Congress that heard his remarks and passed the National Security Act, would have expected the CIA to be paying domestic scientific researchers to study extrasensory perception, the placebo effect, or blood groupings as a means of identification; nor did they contemplate that such researchers would be sources of "intelligence" within the meaning of the Act.

Accordingly, there is no basis in the legislative history of § 403(d)(3) for believing that Congress intended to include scientific researchers of the sort used for MKULTRA as intelligence sources.

*C. The Court of Appeals' Formulation Provides a Sound Basis for Distinguishing Intelligence Sources From Other Persons Upon Whom the CIA Relies.*

The courts below recognized that the sort of persons that Congress had in mind, and whom the CIA's brief consistently invokes when warning of the dangers of the court of appeals' formulation, are unquestionably intelligence sources protected from unauthorized disclosure. Undercover agents; business, professional and vacation travelers who are debriefed by the CIA on their return from abroad; journalists who talk to the CIA about their contacts — all are obviously intelligence sources as Congress used that term in § 403(d)(3). Yet Congress used the term "intelligence" source, not "information" source, and accordingly the issue before the Court is, how to distinguish between these obvious examples of the "intelligence" sources that Congress had in mind, and others who are sources of information, but not "intelligence sources."

The court of appeals' formulation provides a sound basis for making this distinction:

[A]n "intelligence source" is a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

The rule is extrapolated from the characteristics of the traditional sort of intelligence source, whose disclosure was the hazard that Congress sought to prevent. These sources could not obtain information useful to the CIA unless their contacts were kept ignorant of the source's CIA connection. And the CIA would obviously be unable to obtain reliable information



from them without promising that their relationship with the CIA would remain confidential. The court of appeals thus established a formula distinguishing among sources of information who were obviously not intelligence sources and those who were, by taking account of the implicit Congressional objective, that is, the practical need for secrecy to protect the sources of intelligence, which Congress had before it when it enacted the National Security Act.

Although in some parts of its brief the CIA appears to argue that *any* limitation on the scope of the term "intelligence source" would threaten its ability to perform its intelligence mission, an argument discussed *infra* at 33-36, elsewhere it acknowledges that the statutory term has some outer boundaries. The CIA now recognizes the need to distinguish between those who are "intelligence sources" exempt from disclosure and those who are not, but its solution is legally unsound.

Thus, it now concedes (Br. at 36), repudiating its contrary position in the court of appeals, Pet. App. 46a, that § 403(d)(3) would not allow it to withhold the fact that it has obtained information from the *New York Times* and *Pravda*. According to the CIA's new position, the *Times* and *Pravda* are still admitted to be within the literal terms of its proposed definition of "intelligence source," but the CIA should be trusted to exercise its discretion not to invoke § 403(d)(3) because revelation of its use of those publications is "innocuous." Br. at 36.

But the CIA's explanation of what makes disclosure innocuous — that the Agency's consultation is commonly assumed to occur — contains a missing premise which severely undermines the Agency's attack on the decisions below. The CIA's confirmation of the public assumption about its use of these journals is innocuous only because public knowledge of this fact does not interfere with the benefit which the Agency derives from the journals. In other words, because confidentiality of the CIA's connection with the journals is not needed for the intelligence process,

disclosure of that connection is innocuous and need not be prevented. The same analysis would apply to other sources which would not lose their usefulness even if disclosed.

But this approach undercuts the CIA's position in two very important ways. First, because it implies that § 403(d)(3) permits the CIA to decide when a particular person is an "intelligence source," rather than defining with particularity the matters to be withheld, § 403(d)(3) becomes the sort of open-ended discretionary withholding statute which is now excluded from the ambit of Exemption 3(B).

This discretionary approach to disclosure would sweep within § 403(d)(3) many other publications and other sources in addition to the *New York Times* and *Pravda*. For example, the Agency receives various reports from all other agencies which may relate to national defense or security — studies of weather or tide patterns from the National Oceanographic and Atmospheric Administration, estimates of petroleum production or demand from the Department of Energy, economic estimates from the Commerce Department or the Congress' Joint Economic Committee. The CIA also makes frequent use of public libraries, which it argued in the court of appeals were also intelligence sources. Reply Br. in *Sims I*, at 6. Indeed, the CIA's briefs in this Court acknowledge that roughly 80 percent of its raw data is derived from "the great open sources of information." Br. at 38. Presumably, all of these "open sources" are literally intelligence sources under the CIA's construction of the statute, and thus withholdable from public disclosure without any independent national security justification, subject only to the Director's standardless discretion to decide when disclosure would be "innocuous" and therefore permissible.

The second way in which CIA's proposed treatment of "innocuous" sources undercuts its argument is that its analysis is predicated on the recognition that Congress did not intend the CIA to withhold the name of every person who provided any kind of information which was useful to the Agency's mission. But unlike the court of appeals' formulation, the CIA's

proposal would deprive the courts of any ability to review the Agency's withholding decisions by determining *de novo* whether disclosure would implicate the kind of problems which led Congress to enact the withholding statute. This approach to FOIA exemption is totally inconsistent with the letter and spirit of the FOIA generally, and of the post-*Robertson* amendment to Exemption 3 in particular.

Nor would this discretion be limited to the names of the sources. The ability to protect intelligence sources from unauthorized disclosure includes not only names but other identifying details such as information obtained from the source, or information about the activities in which the source was engaged, on the theory that such disclosure could "lead to" the identification of the source. *Gardels v. CIA*, 689 F.2d 1100 (D.C. Cir. 1982). And, although the CIA must support such "lead to" claims with an affidavit, the nature of the question is such that in normal circumstances the claims are virtually immune from effective judicial review.

Thus, every "intelligence source" within the meaning of § 403(d)(3) is surrounded by a large penumbra of "lead to" information which may be withheld from disclosure even without any showing that disclosure of the information would be inimical to the national security. For example, data obtained from other agencies and the contents of public libraries could be withheld on the theory that their disclosure could lead to the identification of the agencies or the libraries from which they were obtained. Accordingly, limitless expansion of the term "intelligence source" with an exception for unreviewable CIA power to waive protection of the statute is tantamount to allowing the CIA unreviewable discretion to decide which of its activities will be disclosed and which may not.

Of course, the CIA has other secrecy needs beyond protecting intelligence sources. Indeed, as discussed more fully in the next section of this brief, other statutory protections are available to meet those legitimate needs. However, the narrow issue before the Court is not whether the CIA should be

able to withhold the identities of the MKULTRA researchers, but whether they may be withheld on the only theory which the CIA has chosen to present in its certiorari petition — that they are "intelligence sources." And on that question, the record in the case establishes that, with a few exceptions, they are not.

The researchers who performed their work in laboratories or libraries plainly did not require confidentiality to persuade their own "sources" to cooperate in their research, or for any other reason that appears in the record. Indeed, many of the researchers were actually anxious to disclose their CIA research, but had to be urged or even threatened to prevent them from doing so. *E.g.*, App. 57, 60; Pet. App. 26a. A large number of others were unaware of any CIA relation to their work, and hence secrecy cannot have been a prerequisite for their cooperation. The evidence persuaded the district court — and the CIA's brief does not dispute this finding — that, with a very few exceptions, the researchers did not either seek or receive guarantees of confidentiality before participating in MKULTRA. Indeed, as the district court observed, the CIA's evidence showing that a few researchers did desire confidentiality only serves to highlight by "stark contrast" the absence of any reason to believe that the others sought it. Pet. App. 26a. Accordingly, the vast majority of the researchers were not "intelligence sources" within the meaning of § 403(d)(3) and are not protected from disclosure by it.

*D. The Court of Appeals' Formulation Recognizes the Agency's Legitimate Secrecy Needs and Does Not Prevent the CIA From Performing Its Intelligence Mission.*

The CIA seeks to buttress its construction of § 403(d)(3) by arguing that the court of appeals' formula "could be extremely damaging to the CIA's ability to carry out its mission." Br. at 29. It posits difficulties which take two forms. First, the formula is said to require disclosure of information which could itself be damaging to the CIA. Br. at 34-40. Second, the mere existence of the standard would compromise the CIA's ability to provide an absolute assurance of confidentiality to



potential sources of information, because such sources would be aware that the assurance would be subject to judicial review. Br. at 30-34. Neither argument withstands analysis.

*1. The CIA's Parade of Horribles Would Not Follow From the Decisions Below.*

The CIA argues that the court of appeals' formulation would require many disclosures which would be damaging to the CIA's legitimate activities. It is contended both that the rule will lead to identification of many persons who require confidentiality and that the rule will require disclosures which would interfere, not with the CIA's ability to tap sources of information themselves, but with its legitimate efforts to conceal the nature of ongoing activities from foreign governments. The errors common to each of these apprehensions are that they either misconstrue the court of appeals' definition or ignore the availability of other statutes that protect its activities from public scrutiny.

a. The fallacy of the CIA's argument that only the traditional secret agent is comprehended by the court of appeals' formulation has already been discussed *supra* at 19-20. Travelers, journalists, and other persons who provide the CIA with information based on their contacts abroad were clearly contemplated by Congress as "intelligence sources" and qualify under the court of appeals' definition. It is obvious that the Agency would be unable to obtain the information that these sources provide without a guarantee of confidentiality. Indeed, the court of appeals in other cases has had no difficulty in finding that such contacts are intelligence sources who are protected from disclosure. *Miller v. Casey*, 730 F.2d 773 (D.C. Cir. 1984); *Afshar v. Department of State*, 702 F.2d 1125 (D.C. Cir. 1983); *Gardels v. CIA*, 689 F.2d 1100 (D.C. Cir. 1982).<sup>7</sup>

<sup>7</sup>The CIA represents, Br. at 17, that the *Sims* decisions were "apparently" not called to the court's attention in *Afshar* and *Gardels*. In fact, the meaning of *Sims I* was debated in each case both by the requesters and by the CIA itself.

b. The CIA suggests that the court of appeals would require identification of persons to whom confidentiality had to be guaranteed so long as the information was "theoretically in the public domain," even though it was not available "as a practical matter." Br. at 35-36. This argument assumes, however, that when the courts below construed the statute with an eye towards "the practical need for secrecy," Pet. App. 50a, they actually intended to disregard the practical requirements of intelligence operations. To the contrary, the courts below were extremely sensitive to the legitimate secrecy needs of the CIA, and there is nothing to support the CIA's contrary reading. The fact that the information was available from sources other than the one used by the CIA obviously bears on the need to guarantee confidentiality in order to obtain it. But if there are practical reasons why the CIA needed the information from a particular source — such as that the source was particularly reliable or convenient, as in the example posed in the CIA's brief at page 36 — the need to guarantee confidentiality to the potential source would be sufficient to warrant non-disclosure.

c. A related CIA objection is that the courts might second-guess the Agency's promise of confidentiality to a particular person, either because the promise was implicit rather than explicit, or was not in writing, and therefore not easily proved after the fact, or because the recipient of a promise was atypically leery of being publicly associated with the CIA. By requiring proof of matters which, by the nature of intelligence operations, are normally not memorialized, the decisions below would assertedly cripple the CIA's operations.

These CIA arguments, although appealing in the abstract, are flawed by their divorce from the realities of this case. Evidence about guarantees of confidentiality was sought here only because of the unique character of the information obtained by the MKULTRA researchers. The results of scientific research conducted at American universities on such subjects as the use of hypnosis as a memory enhancer and polygraph deceiver, or the optical rotatory power of solid and

liquid crystals, was not the kind that would, by itself, imply that confidentiality was necessary.

The court of appeals was at pains to emphasize that evidence would not be needed in most cases. Pet. App. 10a-11a. Here, for example, one researcher's name was allowed to be withheld simply by virtue of the nature of his subproject — a trip to a conference in the USSR. Analysis of MKULTRA Files, *supra* n.4, at 10. Moreover, the courts below did not apply the Statute of Frauds to limit proof of CIA confidentiality guarantees. The district court accepted as adequate any evidence, either of a written guarantee, an express oral guarantee, or a guarantee which was implicit in other evidence which was presented. Pet. App. 26. *E.g.*, App. 62 (expression of desire for confidentiality on a different research project several years after MKULTRA). Indeed, the district court even heard unsworn *ex parte* testimony by CIA officials with no personal knowledge about MKULTRA.<sup>8</sup>

Nor is it accurate to say that the researchers' desire for confidentiality was unprovable because the researchers refused to have their names on documents in the CIA's files. Br. at 31 n.10. Although such reluctance is undoubtedly true of clandestine operators, or travelers and journalists, the record in this case suggests quite the opposite conclusion. Among the documents that survived destruction in 1973 are research proposals and contracts bearing the researchers' names, as well as written promises by researchers to the CIA that the CIA connection would not be revealed by the researchers. *E.g.*, App. 52. In these circumstances, if the CIA did not provide reciprocal promises, it was not because the researchers sought to avoid documentation, but, as the district court ruled, because the researchers did not care about confidentiality. Pet. App. 24a, 26a.

<sup>8</sup> The affidavits offered by the CIA were extremely general, and carefully skirted the key questions of whether confidentiality either was or had to be promised by the CIA to the researchers. Moreover, as the district court noted, Pet. App. 25a, the affidavits were signed by CIA officers who were not involved in MKULTRA, despite the fact that the CIA had managed to produce officers who were involved to testify about the substance and procedures of MKULTRA at the congressional hearings.

Finally, the CIA objects to judicial second-guessing of confidentiality guarantees to persons who were "unreasonably or atypically leery" of open contact with the CIA. The Agency ignores the fact that the court of appeals expressly provided in this and other cases for judicial deference to sworn CIA statements by competent officials about the practical need for confidentiality or about the effects of a particular disclosure on its operations. Pet. App. 51a-53a; *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980). But if the CIA does promise confidentiality to an irrationally wary source, whose information could readily be obtained with equal reliability elsewhere, then a reviewing court should not be precluded from ruling that § 403(d)(3) does not protect that identity from disclosure.

In any event, the outcome in this case cannot properly turn on how the courts will deal with that problem if, indeed, they are ever confronted by such a source. Whatever the merits of its arguments about the need for confidentiality in other circumstances, the CIA has not shown that confidentiality was required for MKULTRA.

d. The CIA also contends that the courts below would require the identification of persons who unwittingly report information to CIA sources about foreign governments or other targets of CIA monitoring. Disclosure would lead, the CIA warns, to retaliation against the intermediary and loss of a valuable source of intelligence. Br. at 39-40 and n.15. There is no dispute about the applicable legal principles; respondents concede that the CIA may refuse to disclose information if it would lead to the identification of an intelligence source — here, the intermediary.

But here there is no such problem. The unwitting researchers in this case were funded by the CIA through a front group, the Society for the Investigation of Human Ecology, not because the researchers were unwilling to help the CIA, but because the CIA wanted to avoid publicity concerning the nature of its interests. *E.g.*, App. 55, 58, 60. Inasmuch as the Society's role in MKULTRA has been identified and the



Society dissolved, the researchers' names cannot be withheld either to protect it from disclosure, or to protect against disclosure of the MKULTRA program itself.

Finally, most of the MKULTRA information was such that, by its very nature, it could be obtained without guaranteeing confidentiality to anyone. For example, studies of reactions to alcohol after social drinking, computer analysis of bioelectric response patterns, and investigations of the transfer and storage of energy in organic systems are plainly of a different order than information about agricultural problems or work stoppages that a CIA agent may obtain from travelers to Kiev or Krakow. The agent, the travelers and the Ukrainians and Poles to whom they talked would be sources of intelligence; in this case, by contrast, neither the Society nor the researchers to whom it turned for scientific services are protected from disclosure. Again, the CIA's counterexamples do not provide a reason to reject the court of appeals' decision in this case.

e. The CIA professes concern that an FOIA requester could force the Agency to identify sources via a more circuitous route. It hypothesizes the case of a person who supplies both information of a sort which makes him or her an intelligence source and other information which is readily available from the public. The CIA argues that it might be required to disclose the nonintelligence relationship, despite the fact that the source would plainly be compromised in its other capacity as well. Br. at 36-37.

It is difficult to understand why the CIA complains about this possibility, inasmuch as respondents never contested the basic legal theory which the CIA asserts. Indeed, the Agency completely prevailed in the district court on this argument in this very case, and thus was permitted to withhold the identities of half of the MKULTRA researchers. In any event, the error of this argument is that it is always open to the Agency to prove that identification of a person with whom it had a non-intelligence contact would "lead to" disclosure of intelligence contacts.

f. The CIA argues that the court of appeals' formula would also require it to reveal the name of an "obscure Eastern European technical journal" to which it subscribes, on the theory that the journal is publicly available. Br. at 36. Although it seems doubtful both that there is any Eastern European publication to which the CIA does not subscribe, and that our adversaries do not assume as much, the example still does not advance the CIA's point. If non-disclosure were not "innocuous," *see supra* at 22, the Agency would surely be able to establish that disclosure of *its* subscription would cause sensitive information to be deleted from or misinformation to be added to the journal, and in that sense confidentiality would be necessary to obtain the information. Moreover, revelation of the indirect subscription might disclose intelligence methods, which are also protected by § 403(d)(3), by revealing the manner by which the journals were obtained undercover. In this case, by contrast, the manner in which the MKULTRA research was initiated, funded, and received by the CIA has been revealed, and the Agency has expressly renounced any reliance on the exemption for intelligence methods. CIA Answers to Plaintiffs' Interrogatories, February 26, 1979, at p. 57.

g. Finally, the CIA argues that it often keeps its contacts secret, not so much because the persons from whom it obtains information insist upon confidentiality, but because the Agency itself wishes to conceal from our adversaries the topics of its interest or the targets of its monitoring. The CIA postulates that revelation of these matters could damage the national security in a variety of ways — by making the targets more elusive; by disclosing the methods by which the CIA operates; and by encouraging others to take countermeasures. The Agency contends that, by confining the intelligence source exemption to only one of the many reasons for CIA secrecy, the court of appeals' formulation severely hampers the intelligence-gathering mission.

There are, however, two flaws in the CIA's analysis, one related to this case, and one of a more general nature. First,

the argument that the CIA often needs to be able to conceal the topics in which it is interested simply has no bearing here. The fact that the CIA was interested in behavioral modification techniques and mind-altering drugs, and conducted a series of research projects on these topics in the 1950's and early 1960's, has already received "broad publicity." CIA Br. at 4. The CIA has disclaimed any interest in concealing from public scrutiny the details of the program, CIA Reply Brief in *Sims I*, at pp. 11-12; they are secret only because of the Agency's own document destruction activities.

But second, and more important, the fundamental error was not committed by the court of appeals, but by the CIA in trying to make the intelligence source exemption bear the full burden of protecting all of the CIA's secrecy interests. Indeed, the legislative debates which the CIA quotes extensively in its brief cut against its argument that § 403(d)(3) protects the CIA's own interest in avoiding enemy knowledge of its interests. For Congress was evidently concerned about the "deadly peril" faced by intelligence sources and about the fact that such sources would "close up like a clam" without protection. CIA Br. at 20. Thus was enacted § 403(d)(3), which does not authorize the Director to "protect the CIA from disclosure of the topics of its interest," but to "protect intelligence sources . . . from unauthorized disclosure."

Section 403(d)(3)'s protection for intelligence sources, of course, is but one of the many defenses available to the CIA in keeping its secrets secret. Even when that defense is not available, it may invoke the intelligence methods portion of § 403(d)(3); it may invoke 50 U.S.C. § 403g to protect the names and other data concerning personnel it employs; and, of course, it may invoke the national security exemption of the FOIA, 5 U.S.C. § 552(b)(1), if the records are properly classified.

In this case, however, the Agency has elected not to rely on these other alternatives despite the contrary urgings by the district court. It may have made this choice because these exemptions do not apply in this case, or as Judge Oberdorfer

said to the CIA without contradiction during an *ex parte* hearing, it may have been done in order to make a test case which could expand the limits of the "intelligence sources" statute. App. 9. See also Pet. App. 60a (per Markey J.). Whatever the reason, the CIA cannot complain that its other secrecy interests, none of which is presently applicable to MKULTRA files, must be considered when it has failed to invoke the statutory defenses which protect them.

*2. The CIA Demand for Protection From the Perception of Its Inability to Prevent All Disclosures Is Tantamount to a Plea for Exemption From Judicial Review Under the FOIA.*

The CIA examples discussed in the previous section were predicated on inaccurate characterizations of the decisions below or incomplete views of the totality of defenses available to the CIA in an FOIA suit. The Agency's final argument, by contrast, is that by holding out even a possibility that in some cases the CIA will have to disclose some information which leads to the identification of a person with which it has had contact, the court of appeals' formulation will inhibit the future gathering of intelligence. By this argument, the CIA is seeking the sort of exemption from scrutiny under the FOIA which Congress has previously denied even with respect to Exemption 1 claims that release of the information sought could endanger the national security.

What matters here is not whether there is an actual disclosure of an intelligence source in any given FOIA case; rather, the CIA is concerned about the "appearance of confidentiality." Br. at 31, quoting *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980). Even if it is unlikely that a person's identity will be disclosed, the CIA argues that a perception that disclosure is even possible may discourage the assistance of persons who will refuse to provide needed information without an ironclad guarantee of confidentiality, even though they would themselves be intelligence sources under the court of appeals' formulation. Thus, the CIA seeks protection against its perceived inability to keep its sources secret.

The basic flaw in this argument is that it proves too much.



Even if the CIA wins this case, *some* potential sources may be deterred from providing the CIA with information simply because the CIA is subject to the FOIA, which in turn requires *de novo* judicial review of the Agency's decisions to withhold records. It is at least theoretically possible that the federal courts could mistakenly require the CIA to reveal some information which would identify an individual or organization that would prefer to avoid identification. Although a CIA victory expanding the definition of intelligence source here might reduce that possibility, the possibility remains, and that may in turn discourage intelligence sources, although perhaps fewer of them. Indeed, the Agency has repeatedly advised the Congress of its concerns in this regard, *see, e.g.*, S. Rep. 98-305, 98th Cong., 1st Sess. 5-8 (1978), but Congress has declined to give the Agency a total exemption from the FOIA such as the one which the National Security Agency has received, 50 U.S.C. § 402 note, Pub. L. 86-36, § 6, that would be needed to cure the perception problem if Congress found that there really was a problem of the sort claimed by the CIA.

Even where a request is for information whose disclosure would assertedly imperil the national security, Congress has provided for *de novo* judicial review of agency classification decisions. Although this Court originally construed the FOIA to require courts to defer automatically to executive decisions to withhold records in the interests of the national defense or foreign policy, *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), Congress amended Exemption 1 to require judicial scrutiny of the national security claims.<sup>9</sup> The CIA's claims under § 403(d)(3) are nothing less than an attempt to revive the rule of *Mink*, without even a national security justification, and in the face of an amended Exemption 3 that was intended to ensure that Congress through the courts, and

<sup>9</sup> That judicial review is deemed by Congress to be vital in the national security area is underscored by the fact that Congress passed the 1974 amendments over President Ford's veto, which singled out the revised Exemption 1 as the primary objection to the amendments. H. Doc. No. 93-383, 93rd Cong., 2d Sess. (1974).

not the agencies, should be making the policy decisions about withholding.

Stated another way, the CIA's real problem rests in the fact that "intelligence source" is a finite category. Some persons are intelligence sources, and some persons are not intelligence sources. Because the FOIA requires courts to review exemption claims, it is the courts' task to decide who are intelligence sources, and the CIA's alleged perception problem will remain so long as there is a boundary and the courts, rather than the CIA, have the ultimate responsibility for mapping it.

But the only way to eliminate the problem, if one were shown to exist, would be to allow the Director to invoke the intelligence source exemption in his sole discretion, without any judicial review. That approach, however, is inconsistent with the basic FOIA principle of *de novo* review and in particular with Exemption 3, which includes only statutes which narrowly confine agency discretion to withhold.

\* \* \*

If the CIA were primarily concerned with the dangers of disclosure here, it would have litigated this case very differently. It would have invoked the national security exemption. Or it would have acceded to the repeated urgings of the district court and contacted the researchers to gain information about their expectations of confidentiality. Or it would have presented affidavits from persons involved in MKULTRA, instead of officers with no direct knowledge about it. In short, it would have taken every precaution to prevent possible disclosure of the MKULTRA researchers.

For the CIA, however, this is a test case in which it is basically unconcerned with whether the MKULTRA researchers are identified. Rather, by presenting an extreme case, while denying the Court any recourse to other national security defenses, the Agency hopes to induce the Court to expand the statutory term of "intelligence source" and protect against a perception problem which it has been unable to persuade Congress to cure. As Chief Judge Markey said in urging that the names be disclosed, "It does the Agency no injustice

to remark that one who appears to have thrown down a gauntlet should not be surprised when it appears to have been picked up." Pet. App. 60a. We urge the Court to reject the CIA's challenge and to affirm the portion of the judgment of the court of appeals that addresses the status of the researchers themselves.

## II. THE CIA FAILED TO PRESENT EVIDENCE TO ESTABLISH THAT DISCLOSURE OF THE REMAINING INSTITUTIONS AT WHICH THE MKULTRA RESEARCHERS WORKED WOULD LEAD TO THE IDENTIFICATION OF INTELLIGENCE SOURCES.

The district court recognized that there was no evidence in the record that the institutions at which the researchers were employed during MKULTRA had demanded or desired confidentiality in order to participate in the program. Pet. App. 27a. Indeed, in almost all instances, the CIA contacted the researchers directly, insisting that the institutions not be informed. *E.g.*, App. 60. Accordingly, the institutions themselves were never sources of intelligence.

However, picking up a suggestion advanced by CIA's counsel at oral argument following the remand from the court of appeals, the district court ruled that, because of "the possibility that [disclosing the institutions] might lead to the indirect disclosure of PRs," the CIA would be permitted to withhold the names of all institutions which employed the researchers who had been found to be intelligence sources. Pet. App. 27a. Although the court of appeals did not specifically address respondents' appeal from this portion of the district court's ruling, by affirming "all other aspects" of that decision, Pet. App. 11a, it apparently intended to affirm in this respect as well.

In objecting to this ruling, respondents do not dispute the general proposition that § 403(d)(3) allows the Agency not only to refuse to release the names of intelligence sources, but also to withhold other information which could lead to the identification of an intelligence source. *See Gardels v. CIA*,

689 F.2d 1100 (D.C. Cir. 1982). However, under the FOIA the agency bears the burden of establishing that any claimed exemption is in fact applicable. 5 U.S.C. § 552(a)(4)(B). This requires the CIA to present evidence, not just arguments of counsel, to support its "lead to" claim. Not only did the Agency fail to present evidence, but the only record evidence bearing on the question pointed in the opposite direction.<sup>10</sup>

Thus, before the CIA's counsel decided to make its "lead to" argument, its affiant, M. Corley Wonus, made the following concession:

With respect to institutions whose identities have not been released, the CIA admits that the *only* viable basis for continuing withholding their identities is a threat of damage to existing intelligence-related arrangements *with the institutions* or exposure of past relationships *with the institutions*. (emphasis added)

App. 27.

Moreover, former CIA director Stansfield Turner also implicitly acknowledged this point when, in his affidavit, he described the reasons why some institutions' names had been released and others had not. Respondents had argued that the voluntary release of more than two-thirds of the names of the institutions indicated CIA recognition that the institutions were not themselves intelligence sources. Admiral Turner's response was that the Agency's obligations under § 403(d)(3) ended when an institution gave its consent to identification. Pet. App. 91a, 92a.

This statement is important for two reasons. It is evident that Admiral Turner did not believe that identification of the consenting institutions could lead to the identification of a researcher who worked there. Indeed, the subprojects for each

<sup>10</sup> In fact, the CIA's original "lead to" claim was that identifying the researchers would lead to the identification of the institutions, rather than the present theory that naming the institutions would lead to disclosure of the researchers. CIA Memorandum in Opposition to Motion for Summary Judgment, at 6 (April 2, 1979).



institution were listed by the CIA adjacent to the institution, as shown in the addendum to this brief, thus specifying the MKULTRA research done at each institution. Moreover, the list of disclosed institutions includes not only such academic giants as Columbia, Harvard and Stanford Universities, but also smaller educational bodies such as the Center for International Studies and Montana State College, and various small companies and public agencies. There is no evidence and no explanation showing how the size and nature of the undisclosed institutions differ from the identified ones, such that identification of the former is more likely to lead to indirect exposure of researchers who worked for them than did naming the latter.

Indeed, although almost all of the institutions, unidentified as well as identified, were unaware of the CIA's sponsorship of MKULTRA work, the CIA told each of them that researchers had been engaged in MKULTRA subprojects there. If disclosure of the institutions would lead to the *respondents'* identification of the researchers, presumably the letters to the institutions would have had at least the same effect. Given the Agency's evident lack of concern about any "lead to" effect of its letters to the institutions, it is apparent that its counsel's "lead to" claim in this case is an unsupportable afterthought.

In the face of these contrary indications, and in light of its burden under the FOIA to justify withholding, it was incumbent upon the CIA to present evidence to support its "lead to" claim. As Judge Wilkey stated in *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980), affidavits on this point would have received "substantial weight," inasmuch as they would advise the court about factual matters within the area of the Agency's national security expertise. Instead of presenting such evidence, however, the CIA rested solely on arguments by its lawyers. Because it submitted no evidence in support of its belated and illogical "lead to" claim, the Agency failed to carry its burden of proof and should have been required to identify all of the institutions.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed insofar as it relates to the MKULTRA researchers. Insofar as it pertains to the institutions, the judgment of the court of appeals should be reversed, and the case remanded with instructions to enter partial summary judgment in favor of the respondents.

Respectfully submitted,

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*Attorneys for Respondents-Petitioners*

August 22, 1984

## **ADDENDUM**

**MKULTRA — Institutional Notifications**

<i>American Psychological Association</i>	Subprojects 107, 125
[deleted]	
<i>American Psychological Association</i>	
1200 17th Street, N.W.	
Washington, D.C. 20036	
<i>Bacteriological and Pharmaceutical Consultants, Inc.</i>	Subprojects 78, 110 (also MKSEARCH)
[deleted]	
[deleted]	Subproject 22
[deleted]	Subproject 142
<i>Bio-Research, Inc.</i>	Subprojects 91, 94
not sent	
[deleted]	Subprojects 8, 10, 63, 66, 75, 114 (also BLUE/ART)
[deleted]	Subprojects 53, 120
<i>Brastendahl Foundation</i>	
See H.J. Rand Foundation	
<i>Butler Hospital and Health Center</i>	Subprojects 66, 114
Butler Hospital and Health Center	
333 Grotto Ave.	
Providence, Rhode Island 02906	
<i>Children's International Summer Villages, Inc.</i>	Subproject 103
[deleted]	
RFD #1	
Ellsworth, Maine 04605	
[deleted]	Subprojects 7, 27, 40

2a

<i>Columbia University</i> [deleted] Columbia University Morningside Heights New York, New York 10027	Subprojects 123, 130
<i>Cornell University and the Medical School at Cornell</i> [deleted] Cornell University and Medical School at Cornell Ithaca, New York 14857 [deleted]	Subprojects 48, 61, 65, 81, 1 (also BLUE/ART)    Subprojects 51, 52
<i>University of Denver</i> [deleted] University of Denver 2301 South Gayford Street Denver, Colorado 80210 [deleted]	Subprojects 5, 29, 49    Subproject 129
<i>The Educational Testing Service</i> [deleted] The Educational Testing Service Rosedale Rd. Princeton, New Jersey 08540	Subproject 77
<i>Emory University</i> [deleted] Emory University Atlanta, Georgia 30322 [deleted]	Subprojects 28, 47    Subprojects 116, 146 (also MKSEARCH)

3a

<i>University of Florida</i> [deleted] University of Florida Gainesville, Florida 32601 [deleted]	Subproject 126    Subprojects 23, 35, 37, 45, 55
<i>George Washington University</i> [deleted] George Washington University Washington, D.C. 20052 [deleted]	Subprojects 57, 129    Subproject 129
<i>Harvard University</i> [deleted] Harvard University Cambridge, Massachusetts 02138 [deleted]	Subproject 84, 92    Subproject 102
[deleted] University of Houston Houston, Texas 77004 <i>University of Illinois</i> [deleted] University of Illinois Urbana, Illinois 61801 [deleted]	Subproject 104, 143   Subproject 9, 26, 44 (also BLUE/ART)  Subproject 9
<i>University of Indiana</i> [deleted] University of Indiana Bloomington, Indiana 47401 <i>Ionia State Hospital for Criminally Insane</i> see Psychopathic Clinic of the Recorders Courts, City of Detroit	Subproject 67, 112



The Johns Hopkins University  
Charles and 34th Streets  
Baltimore, Maryland 21218

Subproject 87

[deleted]

Subprojects 23, 73, 147

*Eli Lilly Company*

[deleted]

Eli Lilly Company

307 E. McCarty St.

Indianapolis, Indiana 46206

[deleted]

Subprojects 6, 18  
(also BLUE/ART)

*University of Maryland*

[deleted]

University of Maryland

College Park, MD 20742

Subproject 59

*Massachusetts Institute of Technology*

[deleted]

Massachusetts Institute of Technology

Center for International Studies

Cambridge, Mass. 02139

Subproject 90

[deleted]

Subproject 38

*University of Minnesota*

[deleted]

University of Minnesota

Minneapolis, Minn. 55455

Subprojects 5, 25  
(also BLUE/ART)

*Montana State College*

[deleted]

Montana State College

Bozeman, Montana 59715

Subproject 22

*J.P. Morgan and Co., Inc.*

[deleted]

J.P. Morgan and Co., Inc.

23 Wall Street

New York, N.Y. 10015

Subproject 58

[deleted]

Subprojects 7, 27, 40  
(BLUE/ART)

*New Jersey Reformatory at*

*Bordentown*

Subproject 47

New Jersey Reformatory at Bordentown

Box 500

Bordentown, New Jersey

*New Jersey Neuropsychiatric*

*Institute*

Subproject 47  
(also MKSEARCH)

New Jersey Neuropsychiatric Institute

Box 100

Skillman, N.J. 08558

[deleted]

Subprojects 134, 137

*Ohio State University*

[deleted]

Subproject 96, 101

Ohio State University

660 Parrington Oval

Columbus, Ohio 43210

*University of Oklahoma*

[deleted]

Subprojects 43, 102

University of Oklahoma

Norman, Oklahoma 73019

*Panoramic Research, Inc.*

not sent

Subproject 94

[deleted]

Subprojects 12, 32

<i>Pedlow Nease Chemical Company,</i> [deleted] Nease Chemical Company, Inc. Manufacturers of Organic Chemicals Lock Haven, Pennsylvania	Subprojects 20, 31, 41
<i>University of Pennsylvania</i> [deleted] University of Pennsylvania Philadelphia, Pa. 19174	[deleted]
<i>Pennsylvania State University</i> [deleted] 201 Old University Park, Pennsylvania 16802	Subprojects 99, 100, 118, 139
<i>Princeton University</i> [deleted] Princeton University Princeton, N.J. 08540	Subprojects 1, 88
<i>Psychopathic Clinic of the Recorders Court</i> [deleted] Ionia State Hospital Ionia, Michigan 48846	Subproject 39
<i>Queens College</i> [deleted] City University of New York 65-30 Kissena Blvd. Flushing, New York 11367	Subproject 98
<i>Rutgers University</i> [deleted] Rutgers University New Brunswick, N.J. 08903	Subproject 69
<i>H.J. Rand Foundation</i> [deleted] Brastendahl Foundation 12720 Lake Shore Drive Cleveland, Ohio 44110	Subproject 79

[deleted]	Subproject 133
<i>Resources Research, Inc.</i> Not sent	Subproject 106
<i>University of Richmond</i> [deleted] University of Richmond Richmond, Va. 23173	Subproject 23
[deleted]	Subprojects 17, 46, 148 (also BLUE/ART)
[deleted]	Subproject 146
[deleted]	Subprojects 124, 140 (also MKSEARCH)
[deleted]	Subproject 21
[deleted]	Subproject 11
<i>Stanford University School of Medicine</i> [deleted] Stanford University School of Medicine Stanford, California 94305	Subprojects 70, 71, 86, 85, 2
[deleted]	Subproject 109
<i>University of Texas</i> [deleted] University of Texas 601 Colorado Street Austin, Texas 78701	Subproject 138

*Texas Christian University* Subproject 119  
[deleted]

Texas Christian University  
Fort Worth, Texas 76129

*University of Wisconsin* Subprojects 97, 105  
[deleted]

University of Wisconsin  
Madison, Wisconsin 53706

### **MKULTRA Additional Institutions Notified**

1. *Atlanta Federal Penitentiary* (Subproject 47)  
[deleted]  
Bureau of Prisons  
320 First Street, N.W.  
Washington, D.C. 20534
2. *Bureau of Narcotics* (Subprojects 3, 14, 16, 42  
[deleted] 132, 149)  
Drug Enforcement Administration  
1405 I Street, N.W.  
Washington, D.C. 20537
3. *Computer Analysis* (Subproject 125)  
Unable to locate — not sent
4. [deleted] (Subproject 58 — Cosponsor)
5. *Leler University of Georgia* (Subproject 129)  
Unable to locate — not sent
6. *Lexington Kentucky Narcotics Farm* (Subproject 73)  
National Institute on Drug Abuse  
11400 Rockville Pike  
Rockwell Building  
Rockville, Maryland 20852
7. *McGill University* (Subproject 68, 121)  
[deleted]  
P.O. Box 6070  
Montreal, Quebec H 3C 361

8. *National Institute of Health* (Subproject 125)  
[deleted]  
900 Rockville Pike  
Bethesda, Maryland 20014
9. *National Institute of Mental Health* (Subproject 125)  
[deleted]  
Director  
Parklawn Building Room 17-99  
5600 Fishers Lane  
Rockville, Maryland 20851
10. *National Philosophical Society* (Subproject 58 — Cosponsor)  
Unable to locate — not sent
11. [deleted] (Subproject 126)
12. *National Research Council* (Subproject 126)  
Unable to locate — not sent
13. *Office of Naval Research* (Subproject 7 — Cosponsor,  
[deleted] also 54 — canceled)  
Assistant Secretary for Health  
800 N. Quincy Street  
Arlington, Virginia 22217
14. *Public Health Service* (Subproject 7 — Cosponsor,  
[deleted] also 36, 40, 46)  
Assistant Secretary for Health  
5600 Fishers Lane  
Rockville, Maryland 20857
15. [deleted] (Subproject 94)
16. [deleted] (Subproject 7 — Cosponsor  
also 18, 40, 146)
17. [deleted] (Subprojects 108, 111, 127)

18. *Veterans Administration Center* (Subproject 125)  
*Martinsburg, W. Virginia*  
[deleted]  
*Martinsburg, W. Virginia 25401*
19. *Worcester Foundation for* (Subproject 8)  
*Experimental Biology*  
Unable to locate — not sent